

Annex D: Application of Non-discrimination Regulatory Obligations in Selected Countries.

1. Summary

This note describes the application of the regulatory obligation of non-discrimination, specifically in the context of interconnection service provision, under different regulatory regimes around the world.

Regulatory regimes are increasingly adopting a consistent approach to the application of non-discrimination obligation. This approach can be summarized as follows:

- 1) Non-discrimination obligations are applied following a determination that an operator holds market power; and
- 2) Non-discrimination requires an operator to provide the same service on the same conditions to all recognized providers, irrespective of the country of origin (in some jurisdictions, this obligation may apply to technical and quality of service standards, however in most jurisdictions it also applies to prices or the non-discrimination obligation is applied together with specific price control obligations¹).

Case studies on the application of non-discrimination obligations are provided below.

2. Case Studies

2.1 Australia

The Australian communications regulatory framework's application of the non-discrimination obligation is broadly consistent with the approach summarized above.

In accordance with Part XIC of the Trade Practices Act 1974 Act, the Australian Competition and Consumer Commission (ACCC) may determine particular services as a "declared service." Once a service is declared, carriers of that service are required to comply with standard access obligations in relation to that service. One of the standard access obligations is a requirement for carriers to provide the service, upon request, to other service providers taking all reasonable steps to ensure that the technical and operational quality of the service is equivalent to that which the carrier provides to itself.² The ACCC determined "GSM Terminating access service" (i.e. mobile call termination) as a "declared service" in 1997. This determination was reaffirmed in 2001 and 2004.

2.2 European Union

The European Union communications regulatory framework's application of non-discrimination obligation is consistent with the approach summarized above.

¹ See, e.g., New Zealand Case Study at 2.4.

² See Australian Competition and Consumer Commission, *Mobile Service Review: Mobile Terminating Access Service*, at §§ 1.1.2 and 2.1 (June 2004), available at [http://www.accc.gov.au/content/item.phtml?itemId=520596&nodeId=file40e2657cac70b&fn=Final%20report%20-%20mobile%20terminating%20access%20service%20\(June%202004\).pdf](http://www.accc.gov.au/content/item.phtml?itemId=520596&nodeId=file40e2657cac70b&fn=Final%20report%20-%20mobile%20terminating%20access%20service%20(June%202004).pdf).

Article 82 of the Treaty Establishing the European Community establishes that “*dissimilar conditions to equivalent transactions with other trading parties*” by “*one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited.*”³

Consistent with the principle established in Article 82 of the Treaty, communications-specific legislation provides regulators with powers to impose non-discrimination obligations on operators that have been determined to have significant market power in defined relevant markets related to the provision of interconnection services. Article 10(1) of Directive 2002/19/EC (“Access Directive”) provides that; “A national regulatory authority may, in accordance with Article 8, impose obligations of non-discrimination, in relation to interconnection and/or access”. Article 8 of the Access Directive provides that national regulatory authorities are empowered to apply obligations, such as non-discrimination, where; “*an operator is designated as having significant market power on a specific market*”.⁴

In addition to the requirement for the operator to have been determined to have significant market power in a relevant market, the Access Directive also provides the circumstances as to the types of services that shall be subject to the non-discrimination obligation. Article 10(2) states; “Obligations of non-discrimination shall ensure, in particular, that *the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services...*”.

It should be noted that the European Union’s approach to non-discrimination obligations in terms of interconnection services has been largely consistent despite changes in the regulatory framework. Article 6 of the 1997 Directive 97/33/EC stated:

For interconnection to public telecommunications networks and publicly available telecommunications services ...provided by organizations which have been *notified by national regulatory authorities as having significant market power*, Member States shall ensure that: (a) the organizations concerned adhere to the principle of non-discrimination with regard to interconnection offered to others. They shall *apply similar conditions in similar circumstances to interconnected organizations providing similar services, and shall provide interconnection facilities and information to others under the same conditions and of the same quality as they provide for their own services, or those of their subsidiaries or partners.*⁵

To date under the 1999 regulatory framework, European regulators have issued decisions which impose non-discrimination obligations on operators with significant market power in the following markets: Austria, Finland, France, Sweden and UK. Other EU Member States are currently conducting their market review of the mobile voice call termination market.

³ See *Consolidated Version of the Treaty Establishing the European Community*, Official Journal of the European Communities, at Article 82(c) (December 2002) available at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf.

⁴ See *Directive 2002/19/EC of the Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities*, Official Journal of the European Communities, at Articles 10(1), 8(1) and (2) (2002) [“Access Directive”] available at http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020424en0070020.pdf.

⁵ See *Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP)*, Official Journal of the European Communities, at Article 6 available at <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/dir97-33en.htm>.

2.3 Japan

The Japanese communications regulatory framework's application of the non-discrimination obligation is broadly consistent with the approach summarized above.

Article 6 of the Telecommunications Business Law⁶ imposes a general obligation on all telecommunications carriers not to "discriminate unfairly in providing telecommunications services".

Article 29(1)(xi) authorizes the Minister for Internal Affairs and Communications to order a telecommunications carrier to "take actions to improve operations methods or other measures" to the extent necessary to "ensure the users' benefit or the public interest" if "there is a risk of extreme impairment of the public interest because proper operations of other telecommunications carriers are interfered with, due to the fact that the telecommunications carrier unfairly discriminates against a specified telecommunications carrier in interconnecting or sharing telecommunications facilities or in providing wholesale telecommunications services...or to the fact that the telecommunications carrier conducts other unfair operations concerning such services".

In addition, Article 29, among other things, also authorizes the Minister for Internal Affairs and Communications to take action if "the telecommunications carrier unfairly discriminates against specified persons." Article 29(1)(ii).

2.4 New Zealand

The New Zealand communications regulatory framework's application of the non-discrimination obligation is broadly consistent with the approach summarized above.

The Telecommunications Act 2001 provides for the regulator to deem access services as a designated service for reasons of promoting competition for the long-term benefit of end-users.⁷ Amongst the standard obligations imposed on operators providing a designating service is; "the access provider must provide the service on terms and conditions (excluding price) that are consistent with those terms and conditions on which the access provider provides the service to itself."⁸ Among the services listed as designated services in Schedule 1 of Telecommunications Act 2001 are fixed-line interconnection services, which are subject to price control obligations determined by the regulator in addition to the above non-discrimination obligation on terms and conditions.⁹

Section 66 and Schedule 3 of Telecommunications Act 2001 also authorize the regulator to amend the list of designated services following an investigation, pursuant to which the regulator is currently conducting an investigation of mobile termination rates. In its draft determination, the regulator (the Commerce Commission) recommends that the following services is added to the list of designated services: "Termination (and its associated functions) of voice calls on a cellular mobile telephone network (which must not be a third generation cellular mobile telephone

⁶ See Japanese Law No. 86, Law No. 86 of December 25, 1984 as amended last by Law No 125 of July 24, 2003. (Unofficial English translation downloaded from website of Ministry of Internal Affairs and Communications http://www.soumu.go.jp/joho_tsusin/eng/Resources/laws/2001TBL.pdf on 4 January 2005.)

⁷ See New Zealand Draft Determination at §§ 18 and 19.

⁸ *Id.* at § 5(c), Schedule 1.

⁹ *Id.* at Part 2, Schedule 1.

network providing voice services)". The regulator recommends that operators providing this service are subject to the above non-discrimination obligation and subject price control obligation based on TSLRIC cost model¹⁰.

2.5 International Telecommunication Union

ITU-T Recommendations recognize that the principle of non-discrimination should be applied to international mobile termination rates.

Section 3.2 of ITU-T Recommendation D.93 (11/2003) on General Tariff Principles – charging and accounting in the mobile services states: "The accounting rates for international traffic terminating at a mobile station should be cost-orientated and *should be applied on a non-discriminatory basis to all relations*, taking into account the principles imbedded in ITU-T Rec. D.140." Sections 1 and 2 of ITU-T Recommendation D.140 (on Accounting rate principles for the international telephone service) recommends that: "(1) accounting rates for international telephone services should be cost-orientated and should take into account relevant cost trends; and (2) each Administration should apply the above principle to all *relations on a non-discriminatory basis*."

Throughout 2002, Vodafone made several proposals in ITU-T Study Group 3 ("SG3") to amend Recommendations D140 and D93, which sought to provide more detailed provisions on non-discrimination, specifically that administrations should not discriminate between domestic and international call rates.¹¹ The proposed amendments were:

¹⁰ *Id.* at 116.

¹¹ Extract from Rapporteur's Report of Rapporteur Group Responsible For Studying Mobile Termination Rates Working Party 2/3 Of ITU-T Study Group 3, Meeting Of 28 – 31 October 2002 **AGENDA ITEMS (1.B) "PRINCIPLE OF NON-DISCRIMINATION" AND (2) "CHANGES TO THE TEXTS OF RECOMMENDATIONS D.140 AND D.98"**

Taking up the discussion in the Report of the June meeting, the Group after a brief discussion agreed that there needs to be language incorporated in appropriate ITU-T Recommendations assuring the non-discrimination of international calls relative to national calls, in particular in respect of call termination charges. The delegate from Vodafone noted that such a rule may be redundant as far as mobile operators are concerned since Vodafone and other mobile operators appear to generally charge the same termination rates for all calls, regardless of where they originate, or, if there is a difference between national and international rates, discriminate in favor of internationally-originated calls, charging a higher rate for nationally originated calls.

As the most appropriate places for such language, the Group identified paragraph 2 in Recommendation D.140 and Article 3 of Recommendation D.93. The boxes below show the new language that the Group proposes be added to these two Recommendations and which spells out this non-discrimination language.

Proposed change to the text of Recommendation D.140

The ITU-T,

... ..

recommends

... ..

2 each Administration should apply the above principle to all relations on a non-discriminatory basis. Accordingly, international calls should not be treated any worse than comparable national calls;

... ..

D.140: "each Administration should apply the above principle to all relations on a non-discriminatory basis. Accordingly, international calls should not be treated any worse than comparable national calls"

D.93: Where 3.2 b) applies but the difference between the two rates cannot objectively be justified on the basis of costs, the following should hold:

a) The difference between the rates for calls terminating on fixed networks on the one hand and calls terminating on mobile networks on the other (arrived at by deducting the lower from the higher) should be no greater than the corresponding difference between the average of the available inter-operator rates for national fixed to fixed calls on the one hand and the average of available inter-operator rates for all national calls terminating on a mobile network on the other. If such a comparison is not possible, the difference should be no greater than the corresponding difference between the average of retail rates for a national fixed to fixed call on the one hand and the average of retail rates for a national fixed to mobile call on the other hand.

While obtaining the support of the Rapporteur Group Responsible For Studying Mobile Service Termination Rates, Vodafone's proposals were not agreed by Study Group 3 (SG3). While SG3 was generally supportive of applying such a detailed non-discrimination provision to mobile terminated traffic, SG3 was not prepared to assume even a general provision in D140, which would apply to both mobile and fixed terminated traffic. Vodafone pointed out the inconsistency in this position since there was no reason to insist upon non-discrimination in relation to mobile terminated traffic, but to refuse to accept it in relation to fixed terminated traffic since the same issue and risk arose in relation to both.

Proposed change to the text of Recommendation D.93

3.6 *Where 3.2 b) applies but the difference between the two rates cannot objectively be justified on the basis of costs, the following should hold:*

- a) The difference between the rates for calls terminating on fixed networks on the one hand and calls terminating on mobile networks on the other (arrived at by deducting the lower from the higher) should be no greater than the corresponding difference between the average of the available inter-operator rates for national fixed to fixed calls on the one hand and the average of available inter-operator rates for all national calls terminating on a mobile network on the other.*
- b) If such a comparison is not possible, the difference should be no greater than the corresponding difference between the average of retail rates for a national fixed to fixed call on the one hand and the average of retail rates for a national fixed to mobile call on the other hand.*

The objective of the proposed additional paragraph to Article 3 of Recommendation D.93 is self-explanatory. The delegate from Vodafone expressed concern that the appropriate benchmark for the mobile termination rate in 3.6 (a) should be national fixed mobile calls, not all calls terminating on mobile networks (which includes mobile to mobile calls) since call cases and interconnection architecture may not be comparable between fixed to fixed calls on the one hand and mobile to mobile calls on the other.